

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)	
)	
Protecting the Privacy of Customers of Broadband)	WC Docket No. 16-106
and Other Telecommunications Services)	
)	

Reply Comments of ITIF

The Information Technology and Innovation Foundation (ITIF)¹ appreciates this opportunity to comment on a challenging and important undertaking by the Federal Communications Commission (FCC or the Commission): the proposed creation of sector-specific privacy rules affecting virtually all aspects of broadband Internet access service (BIAS) providers' collection and use of customer information.²

INTRODUCTION AND SUMMARY

ITIF stands by the points made in our original comments, reports, and other writings, and we do not repeat all of them here.³ Suffice it to say the Commission's proposal rests on a number of faulty assumptions in advancing heightened privacy rules specifically for BIAS providers. A uniform application of light-touch privacy oversight under the Federal Trade Commission (FTC) would far better balance innovation with legitimate privacy interests.

¹ Founded in 2006, the Information Technology and Innovation Foundation, or ITIF, is a 501(c)(3) nonprofit, nonpartisan research and educational institute—a think tank—focusing on a host of critical issues at the intersection of technological innovation and public policy. Its mission is to formulate and promote policy solutions that accelerate innovation and boost productivity to spur growth, opportunity, and progress.

² *Protecting the Privacy of Customers of Broadband and Other Telecommunications Services*, Notice of Proposed Rulemaking, WC Docket No. 16-106, 31 FCC Rcd 2500 (2016) (*Privacy NPRM*).

³ Comments of ITIF, WC Docket 16-106; Doug Brake, Daniel Castro, & Alan McQuinn, ITIF, "Broadband Privacy: The Folly of Sector-Specific Regulation" (2016), <http://www2.itif.org/2016-broadband-privacy-folly.pdf>; Doug Brake, Daniel Castro, & Robert D. Atkinson, ITIF, "The FCC's Privacy Foray: Privacy Regulation Under Title II" (2015), <http://www2.itif.org/2015-fcc-privacy.pdf>; Doug Brake, "The FCC's Privacy Ruse," *Forbes* (April 2016), <http://www.forbes.com/sites/realspin/2016/04/27/the-fccs-privacy-ruse/#1c47825b10aa>.

Instead, these reply comments briefly highlight some important areas of agreement and respond to some of the more spurious arguments in the record. There is broad support in the record for the FCC to change course and align its policies with the more innovation-friendly FTC enforcement model, despite arguments to the contrary.

THERE IS BROAD SUPPORT IN THE RECORD FOR AN FTC-LIKE ENFORCEMENT REGIME

When it comes to supporting data innovation, the FTC model is superior to the rules proposed by the FCC. The FTC oversees fair competition and has broad authority under Section 5 of the Fair Trade Act to take enforcement actions against unfair or deceptive trade practices.⁴ The FTC also offers specific guidance when it comes to privacy, having put forth a single, comprehensive framework guided by three overarching principles: privacy by design, consumer choice, and transparency.⁵

By allowing flexibility for industry to develop best practices within these guidelines, and stepping in ex post where problems develop, the FTC does not have to predict the direction technological advancements or changes in business practices will take us. This allows firms to internalize or outsource different functions in fast-paced industries with a focus on efficiency rather than compliance. This type of privacy oversight, with rules that apply an even, light-touch approach to different actors, would be a better environment for dynamic competition to occur across platforms. A uniform oversight framework, with low regulatory barriers to entry, would not only allow carriers to explore further entry into areas like advertising, but would avoid discouraging new entrants from providing broadband services.

There is broad support in the record for a consistent application of a privacy framework aligned with FTC practices. Groups from across the Internet ecosystem, including advertisers, health-care technology companies, the Chamber of Commerce, and associations representing technology firms and so-called “edge” providers, such as the Information Technology Industry Council and the Consumer Technology Association, all expressed dissatisfaction with the proposal and argued for an approach consistent with the FTC and other existing privacy frameworks.⁶

The FCC proposal deviates from the well-tested FTC enforcement model in several significant ways, most egregiously in structuring its opt-in choice architecture around the services broadband providers seek to

⁴ 15 USC § 45.

⁵ Federal Trade Commission, “Protecting Consumer Privacy in an Era of Rapid Change: Recommendations for Businesses and Policymakers,” March 2012, <https://www.ftc.gov/sites/default/files/documents/reports/federal-trade-commission-report-protecting-consumer-privacy-era-rapid-change-recommendations/120326privacyreport.pdf>.

⁶ Comments of American Advertising Federation et al.; Comments of IMS Health, Inc.; Comments of the Chamber of Commerce; Comments of ITI; Comments of CTA, “In the Matter of Protecting the Privacy of Customers of Broadband and Other Telecommunications Services,” WC Docket No. 16-106.

engage in, instead of consumers' expectations of privacy or risk of harm. It also imposes significant burdens around ensuring data not be re-identifiable and data security requirements.

Former FTC Chairman Jon Leibowitz filed comments outlining the ways in which the proposal deviated from the FTC approach. As Leibowitz put it, "in many important areas [the FCC's proposal] overshoots the mark, proposing regulations for broadband providers that go well beyond those imposed upon the rest of the Internet economy and which, if adopted, would undercut benefits to the very consumers it seeks to protect."⁷ Former FTC Commissioner Josh Wright also weighed in, specifically calling out the negative impact on innovation, characterizing the proposal as one that "fails to consider the economic costs affecting consumers, [Internet Service Providers], and innovation."⁸ Similarly, FTC Commissioner Maureen Ohlhausen criticized the proposal, explaining that the "burdens imposed by a broad opt-in requirement may also have negative effects on innovation and growth."⁹

Perhaps more notable are the comments from current FTC staff, which advised a consistent application of rules across platforms. The FTC staff explained that the current FCC proposal "would impose a number of specific requirements on the provision of BIAS services that would not generally apply to other services that collect and use significant amounts of consumer data. This outcome is not optimal."¹⁰ Indeed, the FTC staff filing offers several key insights that can assist the Commission in changing course to create rules that better promote innovation in a dynamic Internet.

A key recommendation from the FTC is that the FCC make the sensitivity of data the criterion for heightened privacy protection, rather than the type business BIAS providers are engaged in as the FCC proposed. The FTC staff explain that the proposal "does not reflect the different expectations and concerns that consumers have for sensitive and non-sensitive data. As a result, it could hamper beneficial uses of data that consumers may prefer..."¹¹

The three-tier structure is based explicitly on the business model of BIAS providers, rather than consumers' expectation of privacy or risk of harm. Existing, established protocols can successfully exclude sensitive information from marketing use and dramatically reduce the risk of harm. It is therefore difficult to justify the FCC's proposal as anything other than an arbitrary attempt to control the business practices that particular market actors engage in that is likely to impede dynamic competition across sectors.

⁷ Comments of Jon Leibowitz at 2, WC Docket No. 16-106.

⁸ Joshua D. Wright, "An Economic Analysis of the FCC's Proposed Regulation of Broadband Privacy" (May 2016), *available at* <http://apps.fcc.gov/ecfs/document/view?id=60002077298>.

⁹ Comments of FTC Staff, Statement of FTC Commissioner Maureen K. Ohlhausen, WC Docket No. 16-106.

¹⁰ Comments of FTC Staff, WC Docket No. 16-106.

¹¹ *Id* at 22.

While the best option is for the FCC to leave broadband privacy oversight with the FTC in its entirety, the corrections laid out by the FTC filing would be simple steps to dramatically improve the FCC's privacy framework.

THE MISLEADING “GATEKEEPER” THEORY DOES NOT JUSTIFY PRIVACY SILOS

Some commenters assert that BIAS providers are unique “gatekeepers” providing access to the rest of the Internet, justifying sector-specific regulation.¹² Many of these commenters repeat this term, “gatekeeper,” in various proceedings, seemingly as an incantation to constrict BIAS providers to common carrier transport. However, this is a poor model to guide policymaking that advances innovation.

As the FTC explained in its 2012 Privacy Guidelines, although ISPs serve as intermediaries, giving consumers access to other services, “[a]t the same time, the Commission agrees that any privacy framework should be technology neutral. ISPs are just one type of large platform provider” that have access to consumer data.¹³ This view of different Internet actors as interlocking platforms is a better conceptual model for sound policymaking: It respects the porousness of boundaries and allows dynamic competition across industries, and it better captures the interdependencies and complementarity of different Internet actors.

When it comes to privacy, various Internet platforms have different “views” into consumer behavior.¹⁴ The “view” of BIAS providers is not so unique as to justify special, heightened regulations. The access to consumer data on the part of BIAS providers is limited in several respects, as discussed in the Swire report and our original comments.¹⁵ In short, because of the dramatic and unexpected rise in encryption, consumers’ use of multiple networks throughout the day, and the growing use of virtual private networks (VPNs) or similar proxy mechanisms, BIAS providers’ access to data is limited. BIAS providers also already offer consumers the ability to opt out of targeted advertising and other data practices, an important point often overlooked in this debate.

Engineers have pointed out there is a significant gap between what information is technically available to ISPs and what is practically useful. Richard Bennett, a consultant with a 30-year background in network

¹² See, e.g., Comments of Public Knowledge, The Benton Foundation, Consumer Action, Consumer Federation of America, and National Consumers League.

¹³ Federal Trade Commission, “Protecting Consumer Privacy in an Era of Rapid Change: Recommendations for Businesses and Policymakers,” at 56 (March 2012), <https://www.ftc.gov/sites/default/files/documents/reports/federal-trade-commission-report-protecting-consumer-privacy-era-rapid-change-recommendations/120326privacyreport.pdf>.

¹⁴ In this sense BIAS access to data is “unique,” but no more or less “unique” than the other actors across the Internet and not justifying sector-specific rules.

¹⁵ Peter Swire, et al, *Online Privacy and ISPs: ISP Access to Consumer Data is Limited and Often Less than Access by Others*, The Institute for Information Security & Privacy, Georgia Tech, February 2016, <http://peterswire.net/wp-content/uploads/Online-Privacy-and-ISPs.pdf>.

engineering, points out that because of the numerous, diverse connections opened when a typical web page loads, “all the ISP can do with the all that information is guess what the important parts are.... As a practical matter, converting the raw information that ISPs can harvest from web requests made by users who aren’t using VPNs is a very difficult task.”¹⁶

These facts about fundamental limitations to BIAS access to data and the options available to privacy-sensitive consumers are true regardless of BIAS providers’ intermediary or “gatekeeper” status.

Closely tied to these “gatekeeper” theories are arguments around the number of “choices” for BIAS providers. Advocates claim that heightened regulations are justified because there are fewer choices for BIAS providers than there are for edge services. These arguments are frivolous for a number of reasons, most notably that it cannot justify anything beyond an opt-out—which, again, BIAS providers already offer their consumers. If consumers are concerned about a particular data practice, they do not need to change provider when they can choose to opt out. Additionally, many of these arguments are built on a shaky factual foundation of the competitive landscape for BIAS services.¹⁷

It is a widely agreed-upon point that privacy rules in particular, and rules governing technology-enabled practices and business models generally, should be technology-neutral and evenly applicable across different entities.¹⁸ Instead, the FCC is looking to build new regulatory silos based on what business practices it thinks broadband providers should and should not be engaged in.

THE FCC SHOULD IMPLIMENT A CHOICE ARCHITECHTURE THAT PROMOTES INNOVATION

The FCC proposes the wrong up-front choice for consumers by mandating an opt-in process that will reduce consumer welfare, productivity, and innovation. Most people are happy to make trade-offs around privacy and other values, such as convenience or price, but requiring them to go out of their way and take the extra step of opting in would sharply reduce participation rates. For the small share of consumers who truly worry about broadband information practices, they have strong motivations to opt out, and are already able to do so

¹⁶ Richard Bennett, “FCC Confused About Privacy,” *HighTech Forum*, <http://hightechforum.org/fcc-confused-about-privacy/>.

¹⁷ These advocates often rely on the FCC’s arbitrary 25 Mbps threshold—which, as we have argued, is a poor benchmark for broadband competition. See Robert D. Atkinson, “Wheeler Sets the Broadband Bar Higher than South Korea,” *Innovation Files*, (January 2015) <http://www.innovationfiles.org/wheeler-sets-the-broadband-bar-higher-than-south-korea>.

¹⁸ Indeed, this was a motivating concern behind the Administration’s proposed Consumer Privacy Bill of Rights. In supporting that proposed legislation, the White House explained that “[i]t is important that a baseline statute provide a level playing field for companies, a consistent set of expectations for consumers....” The White House, “Consumer Data Privacy in a Networked World: A Framework for Protecting Privacy and Promoting Innovation in the Global Digital Economy,” at 36 (February 2012), <https://www.whitehouse.gov/sites/default/files/privacy-final.pdf>.

under current practice. But the FCC proposal would effectively shut off innovative practices that would benefit the majority of broadband consumers who would otherwise likely be willing to participate.

The FCC should ensure privacy-sensitive consumers are not forced to participate in programs they do not want to. But beyond that, the Commission should design the rules in favor of innovative uses of data. A broad opt-in requirement would do the opposite.

THE FCC IS NOT BOUND BY LEGACY INTERPRETATIONS OF SECTION 222

Some advocates claim that the Communications Act, particularly section 222, is an “unequivocal statutory mandate” to create expansive opt-in rules.¹⁹ This is absurd. Section 222 allows telecommunications carriers to use customer information upon “the approval of the customer,” which has been interpreted in other contexts as satisfied by either an opt-out procedure or an opt-in procedure, or even implied consent. The Commission has substantial leeway to interpret its statute, as we learned with D.C. Circuit’s *U.S. Telecom v. FCC* opinion. The FCC should be guided by the proper policy choice, not legacy interpretations of section 222.

These arguments lay bare the opportunism of Title II reclassification advocates. Net neutrality provided the cover to get the camel’s nose into the tent; overly expansive privacy rules are the obvious next step in constraining for-profit competition in the provision of broadband. The FCC should draw the line and defend innovative experimentation with monetizing broadband data that can lower costs and improve consumer welfare.

CONCLUSION

Some of the policy goals animating the FCC’s proposal are legitimate, but given undue weight. There is certainly an interest in ensuring customers have transparent notice and choice over how their information is used and collected when navigating the Internet ecosystem, but consumers already have this choice, and the FTC framework better balances competition, innovation, and consumer protection.

Given the advent of tools for users to protect their privacy and the fact ISPs provide consumers with meaningful control over the use of their data, there is no specific consumer harm occurring that the FCC needs to correct, and no justification for specific, heightened rules peculiar to the FCC’s jurisdiction.

The proposed regulations would reduce the efficiency of the broadband industry, with resultant loss of broadband network investment and higher prices for broadband consumers. The best option is for the

¹⁹ Comments of Free Press, WC Docket No. 16-106.

Commission to leave broadband privacy with the FTC's enforcement of established framework and guidelines, but to the extent it feels it must act, it should do so in a way that best promotes innovation.

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